In the Supreme Court of the United States

October Term, 1955

No. 338

HOLMBY PRODUCTIONS, INC., and UNITED ARTISTS CORPORATION, *Appellants*

vs.

MRS. FRANCES VAUGHN, MRS. J. R. STOWERS and MRS. BERTHA HALL, constituting the Kansas State Board of Review, HAROLD R. FATZER, Attorney General of the State of Kansas, and DONALD E. MARTIN, County Attorney of Wyandotte County, Kansas, *Appellees*

BRIEF IN OPPOSITION TO MOTION TO DISMISS OR AFFIRM

I

This Appeal Is Taken From a Final Judgment

Appellees contend that this Court does not have jurisdiction to review the judgment of the Supreme Court of Kansas because that judgment was not final for the sole reason that appellants failed to avail themselves of the opportunity to file a motion for rehearing or modification

of the judgment within twenty days after its rendition, as permitted by Rule 16 of the Supreme Court of Kansas. The argument is completely without merit. *Market Street R. Co.* v. *Railroad Commission,* 324 U. S. 548, 551-2 (1945). In *Southern Ry. Co.* v. *Clift,* 260 U. S. 316, 319 (1922), this Court said in regard to a similar argument: "The contention of defendant in error is so obviously untenable that further comment upon it would be the veriest supererogation."

II

The Questions Presented Are Substantial

A. The Subsequent Administrative Regulations in No Way Serve to Cure the Deficiency in Standards

The motion picture "The Moon Is Blue" was disapproved by the Kansas State Board of Review for the second and final time on September 11, 1953 (Transcript pp. 18, 20). Appellees argue in their motion (pp. 5-7) that any deficiency in the statutory standards for censorship contained in the Kansas Motion Picture Censorship Law has been cured by the March 15, 1954, amendment to the regulations of the Board. The fact remains that the Board, after twice viewing the film in question, denied appellants a certificate of approval to exhibit it in the State of Kansas and has not to this date changed that ruling by tendering such a certificate despite the pending litigation. The point of this case is that the Kansas Motion Picture Censorship Law, *as construed and applied to the film "The Moon Is Blue"*, is unconstitutional. The mere writing of words and regulations does not change the statutory construction which is involved in this case.

It should be noted that the administrative regulations do not purport to constitute an exclusive list of grounds

for disapproval of motion pictures and therefore the Board is still free to exercise the broadest authority conferred upon it by statute. In addition, it is apparent from the fact that the regulations referred to by appellees were put into effect on the eve of the trial of this case that the Board feels free to change its regulations at any time.

Furthermore, administrative regulations do not suffice to make valid a statute which fails to meet the constitutional tests as to definiteness of standards for administrative action. *Schechter Poultry Corp.* v. *United States*, 295 U. S. 495 (1935).

B. The Mere Inclusion of the Word "Obscene" in the Statutory Standards Does Not Satisfy Constitutional Requirements

Appellees in arguing (pp. 7-9) that the standard "obscene" has a fixed and objective meaning, do not meet the issue before this Court. Whether "obscene" is subject to being construed with sufficient definiteness to serve as a standard for censorship is not the question. The question before this Court is whether the standard "obscene", when applied as a basis for the disapproval of the motion picture "The Moon Is Blue", is thereby rendered so vague and indefinite as to deprive it of constitutional validity. Furthermore, appellees' argument is based on the assumption that judicial construction lends definiteness to the word "obscene", whereas the Supreme Court of Kansas in this case, as well as in its earlier decision in *Mid-West Photo-Play Corp.* v. *Miller*, 102 Kan. 356, 169 Pac. 1154 (1918), specifically denied that it has the power to compel or correct any particular construction of the statute by the Board.

C. The Constitutionality of the Kansas Motion Picture Censorship Law Is Not *Res Judicata*

Appellees argue (pp. 9-10) that by reason of the decision in *Mutual Film Corp.* v. *Hodges,* 236 U. S. 248 (1915), the constitutionality of the Kansas Motion Picture Censorship Law is *res judicata.* Obviously the doctrine of *res judicata* has no application here. In the first place, the parties are not the same. In the second place, the issues are not the same because a different motion picture and different grounds of attack upon the Kansas Motion Picture Censorship Law are involved. In the third place, it is quite evident that the Kansas *Mutual Film* case, which relies upon *Mutual Film Corp.* v. *Industrial Commission of Ohio,* 236 U. S. 230 (1915), would no longer be followed by this Court. *Joseph Burstyn, Inc.* v. *Wilson,* 343 U. S. 495 (1952); *Superior Films, Inc.* v. *Department of Education,* 346 U. S. 587 (1954).

D. The Acts of the Kansas State Board of Review Are Not Subject to Adequate Judicial Review

Appellees argue (pp. 10-12) that the action of the Board is subject to adequate judicial review. The extent of judicial review actually afforded is exemplified by this case. It is readily evident from the opinion of the Supreme Court of Kansas that it construed the statutory standards in the abstract and denied that it had any power to determine whether the Board had correctly construed the standards. This is emphasized by its reliance on *Mid-West Photo-Play Corp.* v. *Miller, supra,* in which the court said (169 Pac. at p. 1155):

> "So here, the duty and discretion placed in the board of review being administrative in character and nonjudicial, the court is not warranted in substituting its judgment for that of the board. If the board should act fraudulently or so arbitrarily and

> capriciously as to amount to fraud, a resort to the courts may be had and as against such action an aggrieved party may have redress. • • •"

Clearly such limited judicial review does not satisfy constitutional requirements, particularly where the administrative action is censorship within the area protected by the First Amendment. See, *Joseph Burstyn, Inc.*, v. *Wilson*, 343 U. S. 495 (1952); *American Civil Liberties Union* v. *Chicago*, 3 Ill. 2d 343, 121 N. E. 2d 585 (1954).

Conclusion

For the foregoing reasons the arguments advanced by appellees in their Motion to Dismiss or Affirm are wholly without merit. In addition, it should be noted that the motion makes no mention of one basic question raised by appellants, namely, whether the Kansas Motion Picture Censorship Law subjecting motion pictures to a licensing system which requires advance submission to administrative officials for their judgment as to content is invalid on its face as repugnant to the guarantee of freedom of expression contained in the First Amendment and made applicable to the States by the Fourteenth Amendment to the Constitution of the United States. We submit that this question, as well as the other questions raised by this appeal, are plainly of such a character as to require full exploration on briefs and oral argument. The Motion to Dismiss or Affirm should be denied and probable jurisdiction should be noted.

Respectfully submitted,

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